Supreme Court, U.S.
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No. 98-1965

IN THE

Supreme Court of the United States

GLENDA E. WELCH and DOROTHY WELCH,

Petitioners,

v.

TOWN OF MOUNTAIN CITY, GRACE WATTS, CAROLYN HOLT, WILMA McCRACKIN, DAISY MAE THOMPSON, ROBERT CECIL WELCH and PHYLLIS WELCH BLALOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TOWN OF MOUNTAIN CITY

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STATEMENT OF THE CASE AND FACTS

Respondent Town of Mountain City submits that the district court opinion contains an accurate statement of the facts relevant to the issues on appeal (R4-47). Petitioners have not challenged any portion of the statement of facts set out by the District Court. Therefore the district court's finding of facts should be controlling on this appeal. Respondent Town of Mountain City further points out that the order on appeal is grounded on a procedural legal issue, and that the only facts pertinent to this appeal are those stated by the district court. Petitioners' brief is loaded with matters extraneous to the singular issue on appeal, including Petitioners' Statement of Facts .

The relevant facts as found by the district court show that Petitioners Glenda E. Welch and Dorothy Hamrick a/k/a Dorothy Welch are the daughters of George and Buena Vista Welch.

Petitioners' mother died July 6, 1994, and was buried in a church cemetery at the time of her death. Her body was later re-interred in the "Welch Family Cemetery" which was an area designated by Dorothy Hamrick on property owned by Dorothy Hamrick. This "family cemetery" was established by Dorothy Hamrick executing an undated warranty deed conveying the property to herself for the express purpose of dedicating the property for use as a family cemetery. This deed was recorded on March 14, 1996.

Buena Vista Welch's body was interred in the family cemetery prior to the enactment of a burial ordinance by Mountain City Council on July 9, 1996. The Ordinance,

passed July 9, 1996, "Prohibiting Interment of Deceased Persons in Private Cemeteries," prohibits the interment and burial of deceased persons on private property or the establishment of cemeteries on private property and provides for punishment for violation of the ordinance in the nature of a fine.

Following the enactment of this ordinance, Glenda Welch and Dorothy Welch Hamrick's father, George Welch, died August 1, 1996. Petitioners were aware of the ordinance prohibiting the burial of their father in the "family cemetery" on the private property of Dorothy Welch. They knowingly and voluntarily proceeded to bury their father on August 3, 1996, with knowledge of the ordinance expressly prohibiting the act of interment on private property.

On August 4, 1996, the Mountain City Police Department issued a Citation and Accusation to Glenda Welch and one to Dorothy Hamrick for the offense of "interment on private property in violation of Ordinance 7-96-1." (Appellants' #8 Excerpts Complaint, Exhibit H). These accusations were dismissed on October 19, 1996, and the City again issued accusations against Welch and Hamrick for violation of the burial ordinance, on December 11, 1996 (R4-47).

Welch and Hamrick filed suit in the United States District Court for the Northern District of Georgia on March 26, 1997, seeking relief from prosecution under the burial ordinance and requesting injunctive relief to enjoin that prosecution, alleging that they had no adequate remedy at law (R1-1; Complaint para. 79). Before the District Court, Welch and Hamrick alleged that they were at risk of being arrested and placed in jail if they failed to appear for trial

of the citation and accusation in the Mountain City Recorder's Court and that Mountain City should be restrained and enjoined from prosecuting them under the Burial Ordinance. Among numerous other allegations in the Federal District Court complaint, Welch and Hamrick asserted that the Burial Ordinance was unconstitutional.

The Town of Mountain City; Grace Watts, Carolyn Holt and Wilma McCrackin, in their representative capacities as Mayor and members of the Council of the Town of Mountain City, and Grace Watts, Carolyn Holt and Wilma McCrackin, in their individual Capacities, answered the Complaint, asserting that the issues raised in the Complaint were "not ripe for determination" before the District Court as they were currently the subject of pending litigation in the Recorder's Court of Mountain City (R1-9).

These parties also filed a Motion for Summary Judgment setting forth the argument that Welch and Hamrick did not meet their burden under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) to show irreparable injury or threat of immediate injury if the Recorder's Court prosecution was not enjoined (R1-21;22;23). Therefore, they did not present the District Court with grounds for avoiding the abstention doctrine.

The District Court ruled that the abstention doctrine espoused in *Younger v. Harris* required that the United States District Court refrain from adjudicating the claims of Welch and Hamrick for declaratory and injunctive relief, due to the pending Recorder's Court litigation, within which they could raise the question of the constitutionality of the Ordinance and have the Recorder's court adjudicate the issue (Petitioners Appendix 3a).

Welch and Hamrick appeal that ruling arguing essentially two points: (1) that the parties waived the application of the abstention doctrine by agreeing to abate the municipal Recorder's Court proceeding in favor of having the Federal District Court rule on the issue of constitutionality of the ordinance; and (2) that this case falls within the exceptions to the application of the abstention doctrine on three grounds and on those exceptions, the District Court should have adjudicated the merits of the constitutional claims.

On appeal to the Eleventh Circuit Court of Appeals, the District Court opinion was affirmed, per curiam (Petitioners' Appendix 1a).

SUMMARY OF ARGUMENT

The District Court ruled that the abstention doctrine espoused in *Younger v. Harris* required that the United States District Court refrain from adjudicating the claims of Welch and Hamrick for declaratory and injunctive relief, due to the pending Recorder's Court litigation, within which they could raise the question of the constitutionality of the Ordinance and have the Recorder's Court adjudicate the issue (Appellants' Excerpts at #47).

Respondent Town of Mountain City did not waive the application of the abstention doctrine. Respondent agreed to abate the Recorder's Court proceeding solely to avoid duplication of effort. There is no hindrance to the adjudication of the constitutional claims in the Recorder's Court. Petitioners cannot demonstrate that any recognized judicial exception to abstention is present in this case.

This case is controlled by the opinion in *Younger v. Harris* and the order on appeal should be affirmed.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT DID NOT ERR BY DECLINING TO EXERCISE JURISDICTION OVER ISSUES PENDING IN A STATE COURT PROCEEDING WHERE THE PARTIES AGREED TO ABATE THE STATE COURT PROCEEDING AND PROCEED WITH THE SAME ISSUES BEFORE THE FEDERAL DISTRICT COURT.

In the case at bar there was no consent or waiver of the Recorder's Court adjudication of the merits of the constitutional claims. The Record reflects that Mountain City contended, in their Response to Welch and Hamrick's Motion for Summary Judgment that by agreeing to stay the prosecution in the Recorder's Court, Mountain City did not waive the application of the abstention doctrine to this case. The Mountain City Defendants acknowledged that there was a potential for duplication of effort if the matters proceeded before both courts and therefore sought to avoid that by agreeing to abate the Recorder's Court proceeding pending some direction from the Federal District Court. The Petitioners conceded this at page 11 of their initial brief wherein they state:

> *. . . both sides had legitimate reasons for agreeing to suspend criminal prosecution pending rulings by the district court on the opposing motions for summary judgment and*

> *plaintiffs' motion for declaratory judgment. Neither side wanted to spend the time and money necessary for a trial which would have lasted several days and involved a multitude of witnesses without knowing if the Burial Ordinance met constitutional muster, procedurally and/or substantively.*

Petitioners did not contend that there was any bar to proceeding in the Recorder's Court. This Respondent asserted the abstention bar before the District Court.

Petitioners Welch and Hamrick were seeking, in effect, a declaration of the constitutionality of the ordinance on its face. However, there has been no showing on this appeal that such decision was not within the Recorder's Court's jurisdiction to decide. The District Court recognized this at page 6 of its opinion where it stated:

> *The court has no reason to believe that plaintiffs [Welch and Hamrick] would not be afforded adequate protection if they raised their constitutional challenge to the Burial Ordinance in the Recorder's Court. . . . The court is aware of no procedural barrier which would prevent plaintiffs from raising their constitutional challenge as a defense to the criminal prosecution.*

The Petitioners do not contend that there was a procedural barrier to raising their constitutional claims in the Recorder's Court. Rather, they assert that the agreement to abate the Recorder's Court proceeding compelled the Federal District Court to adjudicate the matter on the merits.

The law provides that where there is an adequate opportunity to raise constitutional claims in the state judicial proceeding, even through an appeal, abstention operates to preclude Federal Court interference. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, which explained the *Younger* holding and why the Federal Court should not enjoin a pending state criminal proceeding, except in very unusual situations occurring when the federal plaintiff would not otherwise have a full and fair opportunity to litigate his constitutional claim. The court found that the prohibition of sex discrimination was a sufficiently important state interest and that Dayton would receive an adequate opportunity to raise its constitutional claims in state court judicial review of the administrative proceeding, which was provided for by statute. The Welch Petitioners have no bar precluding full and fair adjudication of their constitutional claims in state court.

Petitioners reference *Falanga, et al. v. State Bar of Georgia*, 1998 WL 493026 (11th Cir., 8/19/98), which states at footnote 2 that the parties signed a written agreement that the State Bar would not prosecute Falanga or Chalker until the district court resolved the lawsuit. They also substituted a nominal plaintiff to challenge the standards that Falanga and Chalker faced formal charges for violating. The district court accepted this agreement and declined to abstain from deciding the case. In *Falanga*, no party took issue with the district court's action to adjudicate the case. The appeals court found that it was within the court's authority to determine whether to accept the agreement since the abstention doctrine stated in *Younger* is not jurisdictional. In contrast, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718, 477 U.S. 619, 91 L. Ed. 2d 512 (1986), the court determined that the

District Court should have abstained from adjudicating the case under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1981). There, the Commission urged abstention and the Dayton Christian Schools, Inc., argued that the Commission waived any claim to abstention because it had stipulated in the District Court that that court had jurisdiction of the action. In the *Dayton Christian Schools, Inc.*, case the court noted that abstention does not arise from lack of jurisdiction in the District Court but from the policies counseling against the exercise of jurisdiction where particular kinds of state proceedings have already been commenced. The *Dayton* court said:

> A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. *See Brown v. Hotel Employees*, 468 U.S. 491, 500, n.9, 104 S. Ct. 3179, 3185, n.9, 82 L. Ed. 2d 373 (1984); *Ohio Bureau of Employment Services v. Hodory*, 431f U.S. 471, 479-480, 97 S. Ct. 1898, 1903-1904, 52 L. Ed. 2d 513 91977); *Sosna v. Iowa*, 419 U.S. 393, 396-397, n.3, 95 S. Ct. 553, 555-556, n.3, 42 L. Ed. 2d 532 (1975). But in each of these cases the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case.

In this case there was no waiver or consent to proceed on the merits, clearly expressed or urged by Mountain City.

Mountain City's stipulation was solely to avoid duplication of judicial efforts — not to avoid the operation of the abstention doctrine. There were adequate due process protections available to protect the Petitioners' right to raise the constitutional challenge to the Burial Ordinance in the Recorder's Court. In the absence of any argument or showing to the contrary, the District Court correctly applied the abstention doctrine and dismissed this matter to proceed before the Recorder's Court.

II.

THE DISTRICT COURT DID NOT ERR IN FINDING NO FACTS TO SUPPORT THAT THIS CASE FALLS WITHIN ANY EXCEPTION TO THE APPLICATION OF THE ABSTENTION DOCTRINE.

Petitioners argue, in the alternative, that if *Younger v. Harris* controls in this matter, then the exceptions to abstention compel a reversal of the order on appeal.

Petitioners' brief asserts (but fails to demonstrate) those reasons which the law treats as judicial exceptions to the application of the abstention doctrine:

> *During all this lapse of years from 1793 to 1970, the statutory exceptions to the 1793 congressional enactment*[1] *have* been only three; *(1) "except as expressly authorized by Act of Congress"; (2) "where necessary in aid of its*

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1. *"In 1793, an Act unconditionally provided: '(N)or shall a writ of injunction be granted to stay proceedings in any court of a state * * *.'* 1 Stat. 335, c. 22, s 5."

> *jurisdiction"; and (3) "to protect or effectuate is judgments." In addition, a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages. . . . [Citation omitted].*
>
> *The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.*

Younger, 91 S. Ct. 746, * * * 749; 401 U.S. 43-44. The court went on to state that the fundamental purpose of restraining equity jurisdiction prevented erosion of the role of the jury and avoided a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted.

The *Younger* opinion quotes a unanimous Supreme Court opinion that supported abstention in a matter where state criminal proceedings not yet formally instituted but sought to be enjoined were not enjoined by the federal courts because there was no necessity for protection of constitutional rights.

> *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714, *and following cases have established the doctrine that, when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.*

Id., at 243-44, 46 S. Ct. at 493.

The Supreme Court has consistently held that irreparable injury must be shown; that is the traditional prerequisite to obtaining injunctive relief. However, a second requisite, against federal interference, is that the injury alleged is both great and immediate. *Fenner v. Boykin*, 271 U.S. 240, 46 S. Ct. 492, 70 L. Ed. 2d 927 (1926); *Younger v. Harris* at 401 U.S. 37, 44, 91 S. Ct. 746, 750.

In the case at bar, Welch and Hamrick are subject to the proceeding for violation of an ordinance, of which they had notice and knowingly and deliberately violated. It

should be noted that they had the opportunity to approach City Council when the ordinance was being discussed, when it was enacted and they could have sought relief from the operation of the ordinance prior to acting in violation of it. Petitioners have not shown that there is a reason that they should be immune from prosecution for violation of the ordinance. The Record supports that they acted deliberately and with knowledge that they were placing themselves in the position of being prosecuted for violating the ordinance, just as any other citizen would be prosecuted for a similar violation. Their claimed injury is that incidental to every criminal proceeding brought lawfully and in good faith. *See Douglas v. City of Jeannette*, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324) (1943).

Petitioners assert that they will be subject to repeated prosecution for the same offense. This assertion arises, presumably from the language of the ordinance treating the offense as one continuing as long as the violation exists. However, this is a singular prosecution and assuming that the proceeding goes forward in regular form in the Recorder's Court there will be but one prosecution for the acts alleged in the pending accusation. Again, the continuing nature of the fine which may be imposed does not translate into separate prosecutions. Respondent hastens to point out that the continuing fine could have been avoided altogether by Petitioners if Petitioners had sought relief and determined their rights prior to carrying out their father's burial, subsequent to passage of the ordinance. They elected to take the risk of being subjected to the fine. There is therefore no support for the assertion of repeated prosecutions or that the sanction they face is unfair.

Moreover, Appellants have the right to contest any fine as excessive, should the Recorder's Court find against them.

Addressing the argument that the ordinance is unconstitutional on its face, the *Younger* opinion speaks directly to such allegation and finds at 401 U.S. 37, 49, 91 S. Ct. 746, 753, that this assertion as grounds for asserting that the operation of it should be enjoined is "*. . . fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision*; . . .". In other words, in the absence of a justiciable controversy, the court would be passing judgment on a law which it had not yet been called upon to enforce. There, the court expressed its reluctance to ever conclude that a federal court could properly enjoin enforcement of a statute solely on the basis of a showing a constitutional infirmity 'on its face'. The *Younger* court outrightly rejected that facial unconstitutionality would justify injunctive relief against good faith attempts to enforce the law, in the absence of any showing of bad faith, harassment or other unusual circumstances. Appellees hasten to point out that those unusual circumstances do not exist in the case at bar.

Petitioners' argument on this point seeks to have this court address the merits of the constitutionality of the ordinance on its face, which is just what *Younger* rejected, as discussed above. Petitioners assert that the accusations pending against them were brought in bad faith and for purposes of harassment. However these assertions are wholly unsupported by any facts relevant to a showing of a denial of due process which precludes Petitioners from raising the constitutional issues before the Recorder's court. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*

Petitioners obviously considered their opportunity to talk to the City Council before the August 4 burial of their father. (Petitioners' Eleventh Circuit brief at page 27) However, they made no effort to formally appear before the council before going forward with their burial plans. Petitioners were on notice that the ordinance passed July 9, 1996. The claim that they were singled out and harassed is hardly credible where the Record shows that they affirmatively stated to council members that they would go forward with their burial plans regardless of any ordinance prohibiting it. Petitioners had no vested right to ignore existing law.

Fundamentally, the Petitioners have failed to establish on this appeal that they made a showing of great and immediate irreparable injury which would duly prompt the Federal District Court to remove the case from operation of the doctrine of abstention.

This was the argument made by Respondent in the response to Welch and Hamrick's Motion for Summary Judgment; that there was no immediate threat of injury to Welch or Hamrick which would demonstrate that they were entitled to avoid the Recorder's court proceeding via filing a Complaint for injunctive relief in the district court on the assertion of constitutional rights violation. Petitioners fail to acknowledge that they had the opportunity to seek a determination from the Recorder's court as to the constitutionality of the ordinance and then to appeal that decision, if it was adverse to their position.

The Petitioners' Brief does not even address the fact that they have the right to proceed, with no procedural barrier to a full adjudication of their constitutional claims in the Recorder's Court.

CONCLUSION

The Federal District Court determined that this case involves the exact situation to which *Younger v. Harris* applies. The Eleventh Circuit's affirmance of that decision is correct. No conflicting holdings within the federal circuits is presented by Petitioners. Petitioners have not presented any argument meriting certiorari review by this Court.

WHEREFORE Respondent Town of Mountain City prays that this Court deny this petition for a writ of certiorari as the decision below is correct and without error.

Respectfully submitted,

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